LEGISLATIVE UPDATE

COVERING CRIMINAL JUSTICE LEGISLATIVE ISSUES

SPRING 2004, NO. 19 — OFFICE OF PUBLIC ADVOCACY

LEGISLATION PASSED BY THE 2004 GENERAL ASSEMBLY

The 2004 General Assembly has completed its work. In terms of criminal justice legislation, there were fewer bills passed than in recent years. There were several significant changes in the law, particularly with the passage of the fetal homicide statute. In past years, several changes in policy were made in the budget bill, and this year would have been no exception. Changes to corrections policies are often placed in the budget bill. Notably, loan assistance for prosecutors, defenders, and civil legal services lawyers was attached to all the versions of the various budget bills and would have become a reality with the passage of a budget. No budget was passed by April 13, 2004, the last day of the General Assembly. The following are the bills that will take effect on July 13, 2004, unless indicated otherwise.

House Bill 108
Sponsored by: Rep. Damron with many cosponsors

This bill was the most significant piece of criminal justice legislation passed this session. The essence of this bill is that KRS 507A is created, adding to the Penal Code the crimes of "fetal homicide" in the 1st, 2nd, 3rd, and 4th degrees. The features common to all of the degrees of fetal homicide are the following:

- The law has an emergency clause and is thus effective immediately.
- An "unborn child" is defined as a "member of the species homo sapiens in utero from conception onward, without regard to age, health, or condition of dependency."
- Acts of health care providers that cause the death of an unborn child are excluded from the reach of this statute where the acts are committed during an abortion procedure consented to by the mother.
- Acts of health care providers that cause the death of an unborn child are excluded from the reach of this statute where the acts are committed as part of reasonable diagnostic testing or therapeutic medical or fertility treatment.
- The acts of a pregnant woman are excluded from the reach of the act.

Ernie Lewis, Public Advocate

Fetal homicide in the first degree has the following features:

- There are three possible mental states for this offense. The first is the "intent to cause the death of an unborn child." The second is the intent "necessary to commit an offense under KRS 507.020(1)(a), which is the "intent to cause the death of another person…." The third mental state is wantonness analogous to that required for a wanton murder.
- The acts of the defendant must "cause[] the death of an unborn child…."
- The same law regarding extreme emotional disturbance is incorporated into the fetal homicide statute.
- Fetal homicide in the first degree is defined as a capital offense. However, "[t]he death of an unborn child shall not result in the imposition of a sentence of death, either as a result of the violation of Section 2 of this Act or as a result of the aggravation of another capital offense under KRS 532.025(2)."

Fetal homicide in the second degree has the following features:

- This crime can occur two different ways. First, if a person intends to cause serious physical injury to the unborn child and causes death, he is guilty of fetal homicide in the second degree. Secondly, if a person intends to kill either the unborn child or a third person and while doing so is acting under the influence of extreme emotional dis-

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INSIDE

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turbance, he is guilty of fetal homicide in the second degree.
- Fetal homicide in the second degree is a Class B felony.

Fetal homicide in the third degree has the following features:
- There is a wantonness mental state.
- The actor must cause the death of an unborn child.
- The statute specifically refers but is not limited to the operation of a motor vehicle.
- This is a Class C felony.

Fetal homicide in the fourth degree has the following features:
- There is a reckless mental state.
- Fetal homicide in the fourth degree is a Class D felony.

Senate Bill 86
Sponsored by: Sen. Tapp

This bill amends the criminal simulation statute in KRS 516.110, and creates instead two crimes, criminal simulation in the first and second degree.

Criminal simulation in the first degree has the following features:
- It has a knowing mental state.
- The act is committed by the knowing manufacturing, marketing, or distributing of any product "which is intended to defraud a test designed to detect the presence of alcohol or a controlled substance."
- It is a Class D felony.

Criminal simulation in the second degree is the old criminal simulation statute. It adds the following features:
- It keeps the intent to defraud mental state.
- The act required is the use of any product "to alter the results of a test designed to detect the presence of alcohol or a controlled substance in that person."
- It continues the possession element, but adds that the possession must be done with "knowledge of its character."
- It adds several definitions pertinent to the previous definition of criminal simulation. Added are definitions of "written instrument" and "coin machine."
- Criminal simulation in the second degree remains a Class A misdemeanor.

House Bill 67
Sponsored by: Rep. Nunn

This is a significant piece of legislation allowing for the involuntary treatment of a person suffering from alcohol and other drug abuse. Presently, a person may be involuntarily committed for alcohol and drug abuse only under the parameters of KRS 202A and 210. House Bill 67 changes that considerably, including the following features:
- A person may be ordered to receive involuntary treatment for "alcohol and other drug abuse." This may only be done where the person: 1) Suffers from alcohol and other drug abuse; 2) "Presents an imminent threat of danger to self, family, or others…or there exists a substantial likelihood of such a threat in the near future;" and 3) "Can reasonably benefit from treatment."
- The process begins with a petition in district court.
- The district court talks to the petitioner under oath and reviews the allegations to determine whether there "is probable cause to believe the respondent should be ordered to undergo treatment."
- If probable case is found, then a hearing is held within 14 days to again determine probable cause.
- At the 14-day hearing, if the court finds that the respondent "should be ordered to undergo treatment," the court can order treatment of either a maximum of 60 or 360 days.
- If the respondent fails to go to treatment, the court may hold him in contempt of court.
- Thereafter, the court may dismiss the proceedings if it appears there is no probable cause to continue treatment or if the petition is withdrawn.
- The court may also order the respondent hospitalized for up to 72 hours after he is examined and is found to meet the "imminent threat" standard.
- The statute explicitly affirms the definitions and procedures of KRS 202A.
- KRS 600.020(3) is amended to redefine "beyond the control of parents" to mean a child "who has repeatedly failed to follow the reasonable directives of his or her parents, legal guardian, or person exercising custodial control or supervision other than a state agency, which behavior results in danger to the child or others, and which behavior does not constitute behavior that would warrant the filing of a petition under KRS Chapter 645."
- "Beyond control of school" is also redefined to mean "any child who has been found by the court to have repeatedly violated the lawful regulations for the government of the school as provided in KRS 158.150, and as documented in writing by the school as a part of the school's petition or as an attachment to the school's petition."

House Bill 7
Sponsored by: Rep. Damron

This bill outlaws the use of a scanning device to record the magnetic strip of a credit or debit card "with the intent to defraud the authorized user, the issuer of the authorized user's payment card, or a merchant." Other features of this bill are:
- Definitions are added to KRS 434.550 to 434.730 of "merchant," "payment card," "reencoder," and "scanning device."
- There are two methods for committing this offense. First, it is committed by using a scanning device. Second, it is also committed by using a reencoder to put information onto a second payment card. Both are Class D felonies for the first offense and Class C felonies for each subsequent offense.

Senate Bill 189
Sponsored by: Sen. Denton

This bill outlaws the hiring of persons at long-term care facilities owned, managed, or operated by DMHMR who have a variety of criminal convictions, including drug offenses, homicide, sex offenses, kidnapping, burglary, arson, all family offenses, all pornography offenses, and many assault offenses. DMHMR is required to request "in-state criminal background information" checks on all applicants from the Justice Cabinet or AOC. If a person is recommended to be hired from out-of-state, a background check must also be conducted.

House Bill 413
Sponsored by: Rep. Riggs

This bill adds $20 in criminal cases to court costs. The $20 is distributed to local governments to be "used for payment of expenses for operation of the local government's police department or contracted police services. All funds distributed to counties with fiscal responsibilities for jails or the transporting of prisoners shall be used for the payment of costs associated with the housing or transporting of prisoners."

House Bill 154
Sponsored by: Rep. Marzian

This bill combined two bills together in the final days of the session. The first part of the bill amends KRS 189A.050 to raise the DUI Service fee of KRS 189A.050 from $250 to $325. It reallocates the percentages allotted to the different entities to hold them virtually harmless while at the same time getting more money into brain injury research and treatment. OPA's portion of the fee is reduced from 25% to 20%. However, this will in effect raise OPA's portion of the DUI fee from $62.50 to $65. 16% will be allotted to the Traumatic Brain Injury Trust Fund and the DMHMR for direct services to individuals with brain injuries in equal portions.

A second part of the bill adds a new section to KRS 210 to create a "telephonic behavioral health jail triage system. The Cabinet for Health Services is required to create this system for the explicit purpose of screening prisoners for "mental health risk issues, including suicide risk." This part of the bill has the following features:

- Every prisoner "upon admittance to detention shall be screened for mental health risk issues, including mental illness, suicide, mental retardation, and acquired brain injury…"
- The system is to be designed to give the jail an assessment of the mental health risk for the prisoners, including recommendations on housing, supervision, and care.
- The system will consist of a screening instrument to be used by the personnel at the jail.
- There will also be established a "continuously available toll-free telephonic triage hotline staffed by a qualified mental health professional which the screening personnel may utilize if the screening instrument indicates an increased mental health risk for the assessed prisoner."
- The system will include the ability to screen and assess non-English speaking prisoners.
- Records developed in the screening and assessment "shall be treated in the same manner and with the same degree of confidentiality as other medical records of the prisoner."
- The bill addresses the admissibility of statements in the following way: "Unless the prisoner is provided with an attorney during the screening and assessment, any statement made by the prisoner in the course of the screening or assessment shall not be admissible in a criminal trial of the prisoner, unless the trial is for a crime committed during the screening and assessment."
- Where the assessment indicates a particular risk level, "the facility holding the prisoner may consider implementing the recommended protocols for housing, supervision, and care delivery that match the level of risk."
- This system is funded with a $5 fee added to criminal court costs.

Senate Bill 14
Sponsored by Sen. Roeding

This is the bill that broadens the reach of KASPER. Among its features are the following:

- The Kentucky Board of Medical Licensure from the Cabinet for Health Services may receive controlled substance data on any physician who associates with a physician who is already under investigation. The Board may also receive data on physicians who are in a geographic area "for which a trend report indicates a substantial likelihood that inappropriate prescribing may be occurring," and on physicians in the geographic area where individual physicians have been identified as prescribing inappropriately.
- Judges and probation and parole officers may also receive the controlled substance data of a defendant who was convicted under KRS 218A or is "documented by the court as a substance abuser who is eligible to participate in a court-ordered drug diversion or probation program."
- Peace officers may share the data with other peace officers if they are "working on a bona fide specific investigation involving a designated person." The officers are required to document who they give the data to and when.
- Medicaid Services may also share the data regarding "overutilization by Medicaid recipients" with law enforcement and with a specified board. A separate bill, SB 40 sponsored by Sen. Denton, also allows the Department of Medicaid Services to "use any data or reports from the system for the purpose of identifying Medicaid recipients whose usage of controlled substances may be appropriately managed by a single outpatient pharmacy or primary care physician."
- The Cabinet for Health Services is required to use the data for "investigations, research, statistical analysis, and educational purposes, and shall proactively identify

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trends in controlled substance usage and other potential problem areas." "Trend reports" are to be published on a quarterly basis. These trend reports are not to identify an individual prescriber, dispenser, or patient.

House Bill 550
Sponsored by: Reps. Webb and Vincent

This is the most significant piece of juvenile legislation this session. Among its features are the following:

- Children in custody "shall not be handcuffed to or otherwise securely attached to any stationary object."
- Children held without the holding of a detention hearing are to be released.
- Children adjudicated guilty of a public offense in addition to other options may be placed on parental supervision, or placed on probation under conditions determined by the court. When a child is placed on probation, the court "shall explain to the child the sanctions which may be imposed if the court's conditions are violated, and shall include notice of those sanctions as part of its written order of probation." Where a child is placed on probation "in conjunction with any other dispositional alternative, that fact shall be explained to the juvenile and contained in a written order."
- The thirteen (13) year age limit for being found a juvenile sex offender is clarified to mean "at the time of the commission of the offense."
- KRS 635.510(3) is amended to require a recommendation by the person performing the juvenile sexual offender assessment to include "whether the child be declared a sexual offender and receive sexual offender treatment."
- The sentencing option for a youthful offender at his 18-year-old hearing is changed from six months to five months. Youthful offenders are to be brought to the county jail at 18 years 5 months to await sentencing.
- Children who are required to register under KRS 17.500 and are in a secondary education program may reside within the statutory limits of KRS 17.495 ("1000 feet of a high school…")

Senate Bill 138
Sponsored by: Sen. Denton

This bill establishes the sexual assault victim assistance fund to be administered by the Crime Victims' Compensation Board. This fund will pay for medical examinations for victims of sexual assault. If the fund is insufficient, the examinations are to be paid by the Crime Victims' Compensation Fund. The victim is not to be charged by the hospital, an examination facility, a doctor, or a nurse examiner for sexual assault examinations.

Senate Bill 52
Sponsored by: Sen. Roeding

This bill amends KRS 610.345 to mandate that the judge order the clerk of court to notify the superintendent of the public school district or the principal of the private elementary or secondary school whenever a child is adjudicated guilty of an offense classifying him as a youthful offender. Thereafter, the superintendent in a public school district is required to notify the principal of the school. The same requirements are applied when the adjudication is for a violent offense, or a felony under KRS 218A, 508, 510, or 527.

The bill also requires the judge to order the clerk to notify in the same manner when a petition is filed or an adjudication occurs involving either felony or misdemeanor charges involving controlled substances, possession of deadly weapons, or physical injury to other persons. This notification must occur within 24 hours of the filing of the petition. If the petition is dismissed, all records created in the school district regarding the petition must be destroyed and not included in the student's record.

When these notices are given to the superintendent and thereafter to the principal, the principal is required to release the information to classroom teachers and counselors.

Senate Bill 145
Sponsored by: Sen. Thayer

This bill amends KRS 510 to add indecent exposure in the first degree "when he intentionally exposes his genitals under circumstances in which he knows or should know that his conduct is likely to cause affront or alarm to a person under the age of 18 years." Indecent exposure in the first degree is a Class B misdemeanor for the first offense, Class A misdemeanor for the second offense committed with 3 years of the first conviction, Class D felony for the third offense committed with 3 years, and Class D felony for subsequent offenses committed within 3 years of the conviction.

Indecent exposure in the second degree under KRS 510.150 is confined to victims 18 years of age and over. It remains a Class B misdemeanor.

Senate Bill 244
Sponsored by: Sen. Borders

This bill makes the "engaging in real estate brokerage without a license" a Class A misdemeanor for a first offense and a Class D felony for subsequent offenses. Where the act occurs "due to failure to renew a previously valid Kentucky license" and the person "avail[s] himself of the remedial provisions of KRS 324.090(3)" there is no crime.

Senate Bill 83
Sponsored by: Sen. Tori

This bill amends KRS 237.110 to allow the issuance of a license to carry a concealed firearm to members of the armed forces of the US on active duty so long as they have been assigned to duty in Kentucky for 6 months or longer preceding their application.

Senate Bill 85
Sponsored by: Sen. Shaughnessy

This bill doubles the fines for speeding in a school zone.

House Bill 396
Sponsored by: Rep. Hoover

This is the Judicial Branch budget bill. It includes $2.1 million in FY05 and $4 million in FY06 "to replace Federal Funds for existing drug court sites whose funding expires during the…biennium." The bill explicitly notes that juvenile drug courts in Kenton and Whitley Counties are included.

House Bill 264 & Senate Bill 209
Sponsored by Rep. Graham, Sen. Stivers

These two bills are substantially similar and criminalize the tampering of livestock and the sabotaging of livestock exhibited at an exhibition, and include the following features:

- Tampering means among other things treating livestock "in such a manner that food derived from the livestock would be considered adulterated…" or injecting them with a prohibited substance including steroids and other substances, or administering drug or feed additives affecting the central nervous system, or using diuretics for cosmetic purposes.
- Sabotaging livestock means, "intentionally tampering with any livestock belonging to or owned by another person that has been registered, entered into, or exhibited in any exhibition…"
- There is an interesting sentencing provision. It reads: "Where a person violates both the provisions of this section and a section of KRS Chapter 512, the person may be prosecuted under the provisions of KRS Chapter 512."
- "Cattle" are explicitly made part of KRS 512 definitions of "property."

House Bill 82
Sponsored by Rep. Burch

This bill addresses the release of information regarding communicable diseases. In essence, the Cabinet will be required to report to the CDC the name rather than a code of persons who have HIV infection. The bill makes the improper intentional disclosing or releasing of information of the "identify of a person upon whom has been conducted a test to detect human immunodeficiency virus infection" a Class A misdemeanor. ■

Ernie Lewis
Public Advocate

Full-Time System Nearing Completion
118 Counties Covered by a Full-Time Office

The Office of Public Advocacy began to cover Campbell County on April 1, 2004. The Covington Office, which opened in 1994, had previously covered only Kenton County. On April 1, the Covington Office expanded to cover Campbell County as well. Today, 118 counties are now being covered by a full-time office (*see map on page 12*). Only two counties remain with a part-time contract delivery system: Barren and Metcalfe.

The Covington Office had been staffed with 8 lawyers. In FY03, Covington handled 4022 cases, with an average of 492 open cases per lawyer. 31% of the cases were felonies handled in circuit court. 4 new lawyers will be added to the Covington Office to cover Campbell County. In FY03, Campbell County had 1138 public defender cases, including 25% of the cases being felonies in circuit court. It would be expected that the caseloads in Campbell County would increase similarly to what has occurred every time a new county is covered by a full-time office.

This is the culmination of 25 years of effort to move from a part-time to a full-time public defender system. It parallels efforts made by offices of Commonwealth's Attorneys. Most counties are now covered by a full-time Commonwealth's Attorney's Office. With increasing full-time presence in prosecutor and defender offices, the result is increased professionalism in the criminal justice system throughout the Commonwealth.

Only Barren and Metcalfe Counties remain. OPA has proposed a Glasgow Office during the last several budget cycles. There is a lot of support for a Glasgow Office. Unfortunately, as a result of our budget situation, the legislature has not funded an office in Glasgow. It is hoped that there will be some way for a Glasgow Office to open sometime during the biennium with the use of increased revenue. ■

Ernie Lewis
Public Advocate

Indigent Defense Systems Found Inadequate in Virginia and Louisiana How would Kentucky Fare?

Two important reports have been issued in 2004 on indigent defense systems in two southern states. Both reports found that the indigent defense systems in those states were failing to provide constitutionally mandated level of services.

There has been a great deal of focus recently on the quality of public defender services nationwide. 2003 was devoted to the *Gideon Year*, a celebration of and reflection on the *Gideon* decision and whether we as a nation were meeting the requirements of that seminal case. *Alabama v. Shelton*, 535 U.S. 654 (2002) reaffirmed *Gideon*'s mandate, and at the same time extended it to misdemeanor cases where probation was imposed. Throughout the last year, the *No Exceptions* campaign was conducted nationwide, aiming "to remind each state of its responsibility to promptly provide qualified counsel to anyone who is facing prison time for criminal charges and cannot afford an attorney. There are no exceptions to this rule." Several years ago, Mississippi reformed its public defender system following a lawsuit finding their system unconstitutional. Thereafter, the state legislature refused to fund the reform, and the system remains mired in its unconstitutionality. Georgia reformed its public defender system following a 2-year task force led by the Chief Justice. A new statewide public defender system has been the result; the state is waiting to fund the reform. Likewise, North Carolina has only recently reformed its system into a statewide public defender system.

A significant component of this reform movement has been the creation of simple standards that each state should meet if they are to comply with the requirements of *Gideon* and *Shelton*. The American Council of Chief Defenders helped write ten standards that the leading chief defenders felt were essential for every state to meet to have a constitutional public defender system. The American Bar Association House of Delegates rewrote the standards and approved them as the *Ten Principles of a Public Defense Delivery System* in February 2002. These standards read in their black letter form without commentary as follows:

1. **The public defense function, including the selection, funding, and payment of defense counsel, is independent.**
2. **Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.**
3. **Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.**
4. **Defense counsel is provided sufficient time and a confidential space within which to meet with the client.**
5. **Defense counsel's workload is controlled to permit the rendering of quality representation.**
6. **Defense counsel's ability, training, and experience match the complexity of the case.**
7. **The same attorney continuously represents the client until completion of the case.**
8. **There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.**
9. **Defense counsel is provided with and required to attend continuing legal education.**
10. **Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.**

These ten principles were utilized in the Louisiana assessment. In both states, the systems failed to meet many of the principles. Policy makers in the criminal justice system need to be aware of these two studies, and of the standards required for a state to meet its constitutional obligations. Likewise, we in Kentucky need to consider how we would fare under similar scrutiny.

Louisiana

The National Association of Criminal Defense Lawyers (NACDL) commissioned the assessment in Louisiana. The National Legal Aid and Defender Association (NLADA) conducted the assessment and wrote the report. It is entitled *In Defense of Public Access to Justice: An Assessment of Trial-Level Indigent Defense Services in Louisiana 40 years after Gideon.* The report portrays a grossly inadequate system of indigent defense, one in which Louisiana has "constructed a disparate system that fosters systemic ineffective assistance of counsel due primarily to inadequate funding and a lack of independence from undue political interference. These two main systemic deficiencies produce numerous ancillary problems including a lack of oversight, training and supervision of those entrusted with the defense of the poor. When combined with the crushing caseloads public defenders are forced to carry, these factors prevent the state from securing justice for all, protecting the peace, and promoting the general welfare of its people."

Louisiana's system of indigent defense according to the report is grossly inadequate in the following ways:

- **Inadequate Funding.** Louisiana primarily funds its system through court surcharges, the only state in the country to fund exclusively through this method. Interestingly, Loui-

siana funds this obligation imposed by *Gideon* on the states through a court surcharge rather than the general fund. This violates Principle #2.

- **Judges appoint local indigent defense boards, resulting in a lack of independence.** This violates Principle #1. One result of this is that when a funding crisis occurred in one parish, the local judiciary tried to take the power of administration and oversight from the local board.
- **Flat fee contracts are used as the primary delivery method in order to save money.** This violates Principle #8. In one parish, when revenues from court costs went down, the indigent defense board disbanded the public defender's office and instituted a flat fee contract. According to the *Ten Principles*, "[c]ontracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or complex cases, and separately fund expert, investigative, and other litigation support services."
- **Excessive Caseloads.** In violation of Principle #5, the attorneys in those parishes studied had excessive caseloads. This was a finding complicated by the fact that there was not an adequate system of caseload data collection in Louisiana. It was estimated that had each attorney worked full-time, they would have been assigned 249 felonies, or 166% of national standards. It was further estimated that one part-time attorney not only carried 166 felonies in the parish studied, but also opened 476 felonies in another parish, had 4 capital cases, and was in private practice. This particular attorney was estimated to be at over 600% of national standards.
- **Cases are assigned to attorneys irrespective of experience and training.** This is a violation of Principle #6. One of the young attorneys in the parish studied was quoted as saying that he did defender work "to cover bills" and until he could build his practice "until I don't have to do it any longer."
- **There is no continuity of appointment, and some appointments occur months after arrest.** This is in violation of Principles #3 & 7. Under Louisiana's rules of criminal procedure, arraignments and the appointment of counsel can occur literally months after arrest. Exacerbating this is that the parish under study featured horizontal representation, where different attorneys represented clients at different stages. "[T]he failure to appoint an attorney that will handle the case from beginning to disposition undermines the intent of early appointment of counsel and erodes any chance of conducting a trial in a reasonable period of time."
- **There is no training required of the public defenders.** This is a violation of Principle #9. New attorneys are not required to attend training. "Without training, attorneys are left to determine on their own what constitutes competent representation and will often fall short of that mark. This is especially true when there are no practice guidelines in place and performance is not monitored on an on-going basis. There simply is no systematic, on-going indigent defense training in Avoyelles Parish or in the rest of the state."
- **There is no supervision, no accountability for attorney performance.** This is in violation of Principle #10. As a result of the lack of supervision, attorney performance was viewed as deficient. One example cited in the report: "[T]he accused was left to advocate on his own behalf, despite the fact that counsel was in the courtroom. The attorney's practice was to stand 15 feet or so away from the defendant during guilty pleas, including those defendants in chains. The attorney was at times laughing with prosecutors or court staff during the proceeding in which his clients were forced to provide their own representation. In one such case, the defendant told the judge that he was not guilty of one of the burglary charges in the bill of information, and after discussion at the bench, the state moved to dismiss that particular charge—though the original plea in relation to sentencing was kept intact. The defense attorney did nothing even after the judge admonished the lawyer to pay attention."
- **There was an abridgement of the right to confidentiality.** This was in violation of Principle #4. Interviews by the public defenders were conducted in open courtrooms. Misdemeanor clients were interviewed in groups. Misdemeanor clients negotiated with the prosecuting attorney with no participation by the public defender. The public defender's office was shared with the probation and parole office.
- **There was no parity of resources with the prosecution.** This violates Principle #8. The prosecution in Louisiana is funded at 3 times that of public defense. The prosecutors had unspent reserves of $38 million, while indigent defense resources were declining and offices being disbanded as a result. In the entire state, prosecutors received $75 million to $25 million for public defenders. In the parish under study, there were 10 prosecutors and 12 support staff compared to 4 part-time public defenders and 1 vacant support staff position. "The disparity in resources between the prosecution and defense functions is graphically reflected in the differences that exist between the two Avoyelles Parish offices. The district attorney's office recently underwent an $850,000 renovation, including all new computers with high-speed Internet access. We were told that most of the changes were funded through Federal grants, though some Parish money was used. Mr. Riddle's office exudes professionalism with all of the modern conveniences offered to prosecutors. By contrast, the Indigent Defender Board Office is in disarray. Generally unmanned…the office looked abandoned. The waiting area was poorly lit, and papers and case files were piled in the one hallway that connected the few offices."

Not coincidentally, Louisiana has the highest incarceration rate in the nation, at 794 per 100,000. Similar to Kentucky, jails in Louisiana profit from housing state prisoners. There is now in existence a Louisiana Task Force on Indigent Defense, with involvement by the Governor, looking into this dire situation.

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Virginia

In January 2004, the American Bar Association Standing Committee on Legal Aid and Indigent Defendants issued a report prepared by the Spangenberg Group assessing the public defender system in Virginia. While this report does not rely upon the *Ten Principles*, the findings are similar to those in Louisiana. Among the findings are the following:

- **Virginia's system fails to protect the rights of poor people accused of crimes.**
- **Resources are inadequate, and the absence of an oversight structure fails to provide lawyers with the tools, time, and incentive to provide adequate resources.**
- **The indigent defense system puts individual public defenders at risk of violating professional rules of conduct.**
- **There is no effective voice in Virginia expressing the needs of indigent defense.**
- **There is a limited use of experts or investigators by public defenders.** Courts rarely appoint experts. One court-appointed lawyer with 24 years of experience as a public defender had never asked for funds to hire an expert witness.
- **Substandard practice has become the norm among public defenders in Virginia.** One attorney stated that "[r]aising constitutional issues in a court-appointed case is almost unheard of. I can't afford to waste all my time on cases I'm not going to be compensated on." Another private attorney stated that there "is a special disincentive to advise the client to go to a jury trial. You will almost always lose money on a jury trial. Bench trials, on the other hand, don't take any more time than a guilty plea."
- **Virginia is at the bottom of the comparison states in funding per-case.** Virginia's funding per case was $245. Among 11 comparison states, Virginia is at the bottom. Colorado funds each case at $889, Ohio at $719, Alabama at $603, West Virginia at $513, Massachusetts at $468, North Carolina at $435, Missouri at $384, Georgia at $310, and Maryland at $306.
- **Virginia has the lowest non-waivable statutory fee caps in the country.** Virginia has both full-time public defenders and appointed counsel. In those places where appointed counsel provides service, non-waivable fee caps are imposed. These caps make the $90 per hour fee meaningless. This results in a disincentive to provide meaningful representation. Virginia limits payment to $112 for misdemeanor and juvenile cases, $1096 for felonies with a sentence above 20 years and $395 for felonies below 20 years. The result? "In Richmond, a court-appointed attorney who took over 300 appointments in one year told us that they constituted 20% of his income, as he had a largely successful retained criminal practice. We asked how he could provide quality service to both his appointed and retained clients, he said he can't. 'In retained felony cases I work hard to investigate the case, look for witnesses, consider discovery and the use of an outside expert.' In felony cases for appointed clients, 'I tell them to investigate the case themselves, look for witnesses and if they find them bring them to the office or to court. Frequently I interview the witnesses just before trial and hope they will help the case. Sometimes they screw up the case and I have to scratch around for a plea.'"
- **Lack of oversight and administration.** One panel attorney said that there was no "oversight of the work done by panel attorneys and said, 'There will always be bottom feeders willing to do the work for virtually nothing.'"
- **Great resource disparity between public defense and prosecutors.** In Richmond, there are 37 lawyers in the prosecutor's office with 35 support staff. The public defender's office has 20 lawyers with 10 support staff. As a result, public "defender investigators…are required to prioritize their work, helping attorneys with the most serious cases. Secretaries are often unable to assist attorneys with even basic correspondence, such as sending out letters to clients, as they are fully occupied keeping up with filing, receptionist, scheduling, and other administrative duties." "Underfunding of public defender offices leaves them without the most basic of office equipment, such as functioning computers, fax machines and internet access, and insufficient secretarial, paralegal and investigative staff."
- **The Commission is more concerned with cheap representation than with the quality of advocacy.**

Other significant findings made in the report:

- Politics are playing a role in the establishment of public defender offices. "In 2003, a lawyer in Newport News who takes court appointed cases circulated a letter to fellow panel members urging them to support political candidates who opposed creation of a public defender office, to avoid losing the 'meal tickets' of indigent defendants for their local practices."
- Virginia is experiencing a high level of turnover in their public defender offices. 65% of staff attorneys have been there under 5 years. "In most offices, most staff attorneys are clearly devoted to their work, although few assistant public defenders remain in their positions for more than a few years. Usually this is because of low pay, but it is also due to high caseloads and inadequate resources. One attorney who worked less than two years as a public defender in Loudon County said 18 months in a public defender office is a long time. At the time he left, four years was the longest any attorney had stayed with the office… 'the problem for the system is too few resources: it grinds good people to dust.'"
- Full-time defenders are averaging 506 new open cases per lawyer per year. As a result, there is a "lack of client and family member contact, inability to do legal research, little or no motion practice, insufficient investigation in cases where investigators are not used, insufficient case and trial preparation, failure to prepare a presentence plan and, eventually, burnout." One new attorney said she had abandoned all of the best practices she had learned in law school, "including talking to police officers, visiting the crime scene, running checks on records, requesting release of medical records, filing motions, investigating, calling employers,

churches and community groups, getting 911 tapes and talking to witnesses. She said the only thing she does now is talk to the client outside the courtroom."

- There is no new attorney training.
- There is little if any supervision.
- There is a small appellate effort in Virginia. Most appeals are handled by trial counsel. There is a small appellate office of 3 attorneys and 1 secretary. Three attorneys there had opened 157 cases in the first 7 months of the year. In the Richmond trial office, 2 attorneys filed 50 original briefs per year. In most appeals handled by private lawyers, a flat fee of $400 is paid for a noncapital appeal.
- There is no post-conviction effort whatsoever.
- There exists a culture of substandard practice. "Virginia is the only jurisdiction they know, thus it is the only indigent defense culture and practice they know. The culture is one where substandard practice occurs and, even worse, is enabled and tolerated…The substandard conditions that court-appointed lawyers and public defenders work under in Virginia have become the accepted norm. This norm breeds a culture of substandard practice that fails to provide adequate and meaningful representation to indigent defendants. Public defenders are overwhelmed with handling crushing caseloads and providing representation with little or no training or resources. Public defenders and assigned counsel simply do not have the time or energy to spend to try to change the status quo, nor do many even realize just how low the status quo is in Virginia. The result is a culture of acquiescence: attorneys do the bare minimum, and often less than the bare minimum, necessary to represent their clients."

As a result of the assessment, the following recommendations are made in the report:

- **"The Virginia General Assembly should fund indigent criminal defense services in cases requiring appointment of counsel at a level that assures that all indigent defendants receive effective and meaningful representation."**
- **"The state should establish a professionally independent statewide indigent defense commission to organize, supervise and assume overall responsibility of Virginia's indigent defense system."**
- **"The newly created commission on indigent defense should have broad power and responsibility for the delivery of indigent criminal defense services."**
- **"The indigent defense commission should adopt performance and qualification standards for both private assigned counsel and public defenders. The standards should address workload limits, training requirements, professional independence and other areas to ensure effective and meaningful representation."**
- **"A comprehensive data collection system designed to provide an accurate picture of the provision of indigent criminal services in Virginia should be established and implemented by the statewide commission."**

Overall, the report concludes, "Virginia's criminal justice system fails to adequately protect the rights of poor people who are accused of committing crimes. Represented by lawyers who have the most meager of resources, indigent defendants in Virginia are denied the fundamental guarantee of due process or fairness, in legal proceedings against them. In the most extreme situations, innocent individuals are wrongfully convicted. According to the center on Wrongful Convictions at Northwestern University of Law, 17 individuals have been exonerated of wrongful convictions in Virginia. Findings from a nine-month study suggest that many more indigent defendants in Virginia have likely received little more than assembly line justice.'

How would Kentucky fare if assessed today?

The Kentucky system of indigent defense has been studied many times over the years. In 1998, the ABA's Bar Information Program issued a report written by the Spangenberg Group. That report indicated some of the following:

- "Overshadowing all of the problems facing and the solutions proposed by DPA is that of burgeoning caseloads. Over the past decade DPA's caseloads have increased dramatically, while funding has failed to keep pace."
- "Kentucky's juvenile defender system is badly in need of repair. Our site work tended to confirm many of the observations made by the Covington-based Children's Law Center in its 1996 report criticizing DPA for placing inexperienced full-time defenders in juvenile court, for contracting with part-time attorneys to handle juvenile cases without any training or experience in juvenile work, and for permitting many juveniles accused of serious offenses to go unrepresented in blatant violation of their constitutional right to counsel and their statutory rights under KRS Chapter 31."
- "In our professional judgement, the once-heralded public defender system in Kentucky can no longer be called either a model or a coherent statewide system. Over the years, the program's caseload has skyrocketed while its budget appropriations have failed to keep pace."
- "[T]he time has come to prepare a comprehensive plan, designed to assure that the Kentucky Department of Public Advocacy can reclaim its heralded stature of 1972—as a model statewide public defender system—as it enters the 21st century. To achieve that goal, DPA must have the cooperation of all three branches of government, as well as the organized bar and the citizens of the Commonwealth. The long-term approach needs a documented budget goal, a comprehensive statewide approach and a group of prestigious leaders of all segments of government, the organized bar and the business community to assure success. The details of such a plan must be developed by leaders in Kentucky."

In 1999, the *Blue Ribbon Group on Improving Indigent Defense for the 21st Century* met as advised in 1998. It consisted of a broad segment of some of Kentucky's top leaders. It included members of all three branches of government and business leaders, including the Chief Justice, the former Chief Justice, the President of the Senate, the Minority Leader of

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the Senate, the Minority Leader of the House, and the Chair of the House Appropriations Committee. It was bipartisan. It included the President of the KBA and the future President of the KBA. It included law professors. It included several Cabinet Secretaries. It was precisely the kind of body called for in the 1998 ABA/BIP Report. The *Blue Ribbon Group* made 14 findings and 12 recommendations, many of which sound eerily similar to the Virginia and Louisiana assessments. Included in the findings and recommendations were the following:

- "The Department of Public Advocacy ranks at, or near, the bottom of public defender agencies nationwide in indigent defense cost-per-capita and cost-per case."
- "The Department of Public Advocacy per attorney caseload far exceeds national caseload standards."
- "The Department of Public Advocacy ranks at, or near, the bottom of public defender salaries nationwide for attorneys at all experience levels."
- "Full-time trial staff should be increased to bring caseloads per attorney closer to the national standards. The figure should be no more than 350 in rural areas and 450 in urban areas."
- "The $11.7 million additional funding for each of the 2 years is reasonable and necessary to meet DPA's documented funding needs…"

The Governor and the General Assembly responded significantly to the *Blue Ribbon Group* report. $4 million in additional funding was placed into OPA's General Fund for FY01, and $6 million was added for FY02. However, in both years of the biennium, OPA's budget was cut along with the rest of state government. In FY03, OPA was flat-lined in the Governor's Spending Plan. In FY04, OPA's budget was increased slightly, to $29.8 million, enabling OPA to open offices in Boone and Harrison Counties. More importantly, an Appropriations Increase authorized OPA to spend accumulated revenue in an amount of $1.5 million additional dollars. At the time of this writing, there is no budget set for FY05-06. The Governor's Budget authorized OPA to spend an additional $1 million in accumulated revenue during FY 05 and $1.1 million in FY06. If authorized in a budget this spring, or in a spending plan, this additional funding will pay for additional caseload reduction, salary increments, and health care costs.

During the last 8 years, OPA has utilized its increased general fund dollars to complete virtually the full-time system throughout the Commonwealth, from 47 counties full-time in 1996 to 118 today. Additionally, OPA has used increased funding to raise defender salaries and to deal with the continued increase in caseloads.

So where would Kentucky's indigent defense system fare if an assessment were conducted today, utilizing the *Ten Principles*? It is, of course, awkward for me as Public Advocate to evaluate our system. Such an assessment requires objectivity, data collection, field observations, and national comparisons. I do have some comments, however, that might help place the Virginia and Louisiana assessments into perspective.

- **Principle #1: Independence.** Kentucky has placed its system of indigent defense in the Executive Branch since the inception of OPA in 1972. OPA is established as an "independent agency of state government, attached for administrative purposes to…" KRS 31.010. A Public Advocacy Commission is created by KRS 31.015 that has as one of its primary duties to "[a]ssist the Department of Public Advocacy in ensuring its independence through public education regarding the purposes of the public advocacy system." No prosecutor, law enforcement official, or judge may serve on the Commission. KRS 31.015(1)(a). The Public Advocacy Commission is responsible also for overall supervision of the Public Advocate and the public advocacy system as well as approving of its annual budget. Kentucky has by statute built in independence into its system of indigent defense, as required in Principle #1. As a matter of practice, few judges in Kentucky appoint specific public defenders, but rather appoint the office. Appointments are then made by the directing attorney based upon merit. As opposed to Louisiana, judges in Kentucky do not threaten OPA's independence.
- **Principle #2: Full-time system with participation of the private bar.** There are 29 field offices serving 118 of Kentucky's 120 counties. In each of the offices, conflicts are handled by contract with private lawyers. 2679 of the 115,178 cases handled by the Trial Division in FY03 were handled by private lawyers. OPA has a Post-Trial Division that primarily utilizes full-time defenders to deliver services on appeal, post-conviction, and in the post-dispositional stage for juveniles. The Post-Trial Division also utilizes contracts with private lawyers in cases where the full-time defender cannot handle the case.
- **Principle #3: Appointment soon after detention.** Kentucky does not have the same deplorable procedural system as Louisiana that results in a person not having access to counsel for weeks and months after arrest. OPA has adopted the NLADA Standards, and requires as office policy seeing a client within 48 hours of appointment. Kentucky by rule of criminal procedure does not ensure *County of Riverside v. McLaughlin* is complied with, and thus sometimes persons are not arraigned within 48 hours of arrest. PTRO's are trying to obtain a probable cause determination from judges within 48 hours of arrest.
- **Principle #4: Sufficient time and space.** This varies from office to office. Anecdotally there are places where interviews are not conducted until the client goes to court. It is my impression that in most offices, clients are interviewed in confidential settings relatively soon following appointment, unless they are out on bond.
- **Principle #5: Caseloads permit quality representation.** It is here that an assessment in Kentucky would be most similar to that in Louisiana and Virginia. Kentucky caseloads are excessive and increasing. Louisiana had

attorneys with 166% of national standards. Virginia full-time attorneys had caseloads of 506 per lawyer per year. In FY03, Kentucky full-time trial lawyers opened 484 new cases, a mixture of misdemeanor, juvenile, and felonies, including capital. It is estimated that this is at least 150% of national standards, and close to that of the two states assessed. This figure rose slightly to 486 after the ½ year report. OPA received an Appropriations Increase of $1.5 million in November, and all of that is going toward caseload reduction. Unfortunately, rising caseloads are resulting in OPA's barely holding our collective heads above water.

- **Principle #6: Case assignments are made according to counsel's ability, training, and experience.** OPA is in substantial compliance with this principle. OPA has as a practice the assignment of attorneys whose skill level matches the complexity of the case.
- **Principle #7: Vertical representation.** OPA affirms vertical representation. However, there are some offices where horizontal representation continues to be the practice in contravention of OPA policy.
- **Principle #8: Parity between defense and prosecution.** This is another principle where Kentucky would be vulnerable during an assessment. Kentucky performs best on salary parity. Since 2000, there has been substantial salary parity. Indeed, most recently Kentucky full-time entry-level prosecuting attorneys start at $2000-3000 below their defender counterparts. Elected Commonwealth's Attorneys receive a much higher level of compensation than their defender directing attorney counterparts. Where parity breaks down is in the numbers of prosecutors versus the numbers of defenders. Kentucky funds its prosecution function at over $72 million per year compared to $31.5 million for the defense. This is certainly better than Louisiana, where there is a 3 to 1 disparity. However, OPA represents over 90% of the cases in circuit court. The percentage is much lower in district court, where many eligible defendants proceed without counsel. As a result, there are many fewer defenders in most offices than there are prosecutors. Recently, additional prosecutors were added in Eastern Kentucky through federal grants in order to prosecute drug cases. There was no new money for defenders. I do not know how prosecutors' offices are staffed with support personnel. OPA staffs its defender offices at 1 secretary to every 3 attorneys. There is one investigator per office. There are no paralegals and virtually no other support such as social workers or sentencing specialists other than in specialized areas such as capital offices. Another area where the funding disparity effects quality is in the payment to private attorneys representing conflicts of interest. OPA is not able to pay private attorneys in conflict cases at a level that pays the attorneys for the time they spend. As in Virginia, the payment in conflict cases is a disincentive to go to trial.
- **Principle #9. Training.** It is here that Kentucky sets the standard. Kentucky's educational component for public defenders is superior. New attorneys are required to attend training in district court practice, juvenile law, mental health and expert practice, post-conviction, and circuit court. Defenders are required to attend a weeklong litigation-training institute. Once every three years, capital education is made available. Additionally, limited spots are available to defenders in national litigation and capital education. Directing attorneys in field offices have as part of their job description being the primary mentor and trainer of all new attorneys.
- **Principle #10. Supervision for quality.** OPA believes in supervision. OPA's policies and procedures mandate that supervisors are responsible for the professional conduct of their employees. Case reviews are the norm. Each full-time merit attorney is evaluated three times per year. OPA has adopted the NLADA Standards, and expects its attorneys to comply with them.

Other observations:

- At the time of the *Blue Ribbon Group* report, Kentucky was ranked at the bottom of the country in three benchmarks, cost-per-capita, cost-per-case, and defender salaries. Kentucky now spends $6.65 per capita. This has raised Kentucky to 40th out of 50 states. The average across the nation is $9.81 per capita. Kentucky spent $238 per case in FY03. This ranked even below Virginia, which was at the bottom of 11 comparison states at $245 per case. Kentucky's starting salary of $35,000+ for entry level lawyers has raised it to approximately what surrounding states are paying. This is not the kind of progress envisioned by the *Blue Ribbon Group*, but it is significant progress nevertheless.
- Kentucky is one of the most cost-efficient states in the nation in terms of providing quality representation for little money. While Kentucky ranks only 40th in the nation in cost-per-capita, I believe the quality we provide is much higher. The reason is that we have a statewide defender system utilizing primarily full-time public defenders. Simply put, we get more bang for our buck in Kentucky. Our defenders are criminal law experts. They are paid a modest salary. Kentucky does not have to pay private lawyers a high hourly fee to represent indigents. Having a statewide system that provides representation from arrest through appeal and post-conviction allows Kentucky to use its resources strategically and well.
- Our conflict system is neither cost-efficient nor a model. OPA pays private lawyers for conflicts. There are varying methods, varying contracts, varying hourly rates, with significant disparity from one office to another. Conflict attorneys are not required to attend training, and they are not supervised. Similar to both Virginia and Louisiana, in most cases conflict attorneys operate on a flat-fee contract, which operates as a disincentive for going to trial or otherwise putting in significant hours.
- As opposed to Virginia, Kentucky provides excellent post-trial representation. OPA has a central appeals unit with 19 lawyers with a caseload of no more than 20 new appeals assigned per year. OPA has a post-conviction

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branch as well that represents all court-appointed persons. In addition, OPA has a Kentucky Innocence Project in its post-conviction branch that features collaboration with students across the state working to secure release for the actually innocent.

- Kentucky has a Juvenile Post-Dispositional Branch that provides counsel to children in treatment facilities on fact, duration, and conditions of confinement issues.
- OPA is trying to build a culture of professionalism and excellence, in contradistinction to that described in both Virginia and Louisiana.
- Like Virginia, there is a high rate of turnover among Kentucky defenders. It is estimated that between 10-15% of Kentucky's defenders leave their post each year.
- Kentucky provides a fund through KRS 31.185 that provides for the appointment of experts where reasonable necessity is proven at an *ex parte* hearing.
- Kentucky relies extensively upon objective caseload data for budgeting, staffing, and supervision. OPA has a caseload tracking system that is outmoded and in need of modernization. Kentucky needs to invest more in developing a better caseload tracking system for indigent defense.
- OPA has a regular voice on indigent defense matters, as opposed to Virginia. OPA is appointed on most statewide criminal justice bodies. OPA is present at all House and Senate Judiciary Committee meetings, and has the freedom to speak on criminal justice matters. OPA speaks to policy makers through *The Advocate* and *The Legislative Update*. Certainly, at times it seems as if the voice of indigent defense is not heard in the halls of power. However, Kentucky is certainly doing better than either Louisiana or Virginia is in this arena.
- While politics are playing a major role in Virginia in determining where and when offices are opened, they have not played a major role in recent years in Kentucky. Rather, a consensus developed in the 1990's that full-time representation in both the prosecution and defense function was the superior method of service delivery, and that it would result in heightened professionalism throughout the criminal justice system. As a result, a full-time office now covers all but 2 counties.
- There is not a "culture of substandard practice" in Kentucky. Kentucky public defenders are well trained and hard working. They want to meet their professional responsibilities. Rather than acquiesce to substandard practice, they rail against excessive caseloads and insist on the right to represent their clients fully and zealously.

We have accomplished much in our efforts to improve our public defender system in Kentucky. We have done much, and we have much left to be done. We need to learn from what has occurred in Virginia and Louisiana. We need to continue to strive to meet the *ABA Ten Principles* as well as the NLADA Performance Standards. We need to remain vigilant and not permit excessive caseloads to overwhelm what is becoming an excellent system of indigent defense. ■

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